[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE APPLICATION OF THE COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES, FOR AN ORDER AUTHORIZING THE RELEASE OF CERTAIN GRAND JURY MATERIALS	No. 19-5288

EMERGENCY MOTION FOR STAY PENDING APPEAL AND FOR AN IMMEDIATE ADMINISTRATIVE STAY PENDING DISPOSITION OF THE STAY MOTION

INTRODUCTION

The Department of Justice respectfully requests that the Court grant a stay pending appeal of the district court's order entered on Friday, October 25, 2019, directing the Department to disclose secret grand-jury materials from the Mueller investigation to a committee of the U.S. House of Representatives within five days—by Wednesday, October 30. A stay of that order, which rests on multiple errors of law, is essential to protect this Court's opportunity to decide the important questions presented by this case before the secrecy required by Federal Rule of Criminal Procedure 6(e) is irrevocably lost.

The Department also respectfully requests that the Court enter an immediate administrative stay of the October 30 deadline pending the Court's disposition of this stay motion. Although the district court acknowledged that appellate review of its order was inevitable, it nonetheless directed the Department to disclose the information within just five days. The district court gave no explanation for that arbitrarily expedited deadline, which not even the Committee requested. The October 30 deadline threatens an irreparable loss of grand-jury secrecy before this Court even has a chance to act on the Department's stay motion. An immediate administrative stay is therefore warranted to permit this Court—and, if necessary, the Supreme Court—a meaningful opportunity to consider and act on the Department's stay motion. If the Court denies this motion, the Department respectfully requests that, at a minimum, the Court enter an administrative stay, or continue such a stay, for a

reasonable period to allow the Solicitor General an opportunity to seek relief from the Supreme Court.

For the reasons explained below, the Department is likely to succeed in its appeal of the district court's order, and a stay is necessary to avoid an irreparable breach of grand-jury secrecy. The court directed the Department to disclose to the Committee (1) all portions of Special Counsel Robert S. Mueller's *Report on the Investigation Into Russian Interference In The 2016 Presidential Election* ("The Mueller Report") that were redacted to protect grand-jury information; and (2) all underlying grand-jury transcripts or exhibits referenced in those portions of the Mueller Report. Dkt. 45 at 1. That order represents an extraordinary abrogation of grand-jury secrecy: not only are the materials at issue squarely protected by Rule 6(e), but some relate to ongoing criminal investigations or prosecutions. The district court ruled that it was nonetheless appropriate to require the Department to disclose this information to the Committee, *first*, because an impeachment trial in the Senate qualifies as a "judicial proceeding" for purposes of Rule 6(e)(3)(E)(i); *second*, because the Committee's proceedings to date qualify as "preliminarily to" such a judicial proceeding for purposes of the Rule; and *third*, because the mere possibility that the House might approve articles of impeachment necessarily establishes a "particularized need" justifying disclosure under the Rule. This Court, which has never clearly resolved any of these questions, should have an opportunity for review before the secrecy of the grand-jury materials at issue is irreparably lost.

Pursuant to Federal Rule of Appellate Procedure 8(a)(1), the Department earlier today filed a motion for stay pending appeal in the district court. *See* Dkt. 48. The district court has ordered a response to that motion by noon tomorrow, and we will advise the Court immediately when the district court acts. Nevertheless, to give this Court time to act before the impending October 30 deadline, the Department files this motion now in an abundance of caution. The Committee has informed us that it opposes the motion for a stay pending appeal, but consents to a seven-day administrative stay and intends to file its opposition by 4pm on Friday, November 1.

STATEMENT

A. Background

On March 22, 2019, Special Counsel Robert S. Mueller, III submitted his confidential Report to the Attorney General pursuant to 28 C.F.R. § 600.8(c). On April 18, 2019, a version of the report was disclosed to the public with certain sensitive material redacted. That same day, the Department announced that it would "provide the Chairman and Ranking Members of the House and Senate Committees on the Judiciary, the members of the 'Gang of Eight,' and one designated staff person per member" the ability to review the Report *in camera*, unredacted except for the grand-jury information. Dkt. 20-5. Unsatisfied, on April 19, 2019, the Committee served a subpoena demanding the Attorney General's testimony, as well as, *inter alia*, the unredacted Report, all documents referenced in the Report, and all documents created by the Special Counsel's Office. Dkt. 1-8.

With respect to the grand-jury information redacted from the Report, the Attorney General explained that "Rule 6(e) contains no exception that would permit the Department to provide grand jury information to the Committee in connection with its oversight role." Dkt. 1-12 at 4. "The Department has, however, provided you . . . with access to a version of the report that redacts only the grand jury information . . . [T]his minimally redacted version would permit review of 98.5% of the report, including 99.9% of Volume II, which discusses the investigation of the President's actions." *Id.* While protecting grand-jury information, the Department continued to try to accommodate the Committee's stated need for the information. *See, e.g.*, Dkt. 20-6. On May 24, the Committee stated that it "intends to seek a court order permitting the Committee to receive those portions of the report redacted on Rule 6(e) grounds." Dkt. 1-16 at 2 n.2.

Over two months later, on July 26, the Committee filed an application with the district court seeking "all portions of [the Mueller Report] that were redacted pursuant to" Rule 6(e); "any underlying transcripts or exhibits referenced in the portions of the Mueller Report that were redacted pursuant to Rule 6(e)"; and "transcripts of any underlying grand jury testimony and any grand jury exhibits that relate directly to" four broad categories of information about President Trump and former White House Counsel Donald McGahn. Dkt. 1 at 1-2.

The parties then jointly proposed a briefing schedule, adopted by the district court, under which the Department filed an opposition to the application on

September 13 and the Committee filed a reply on September 30. Dkt. 5. A hearing followed on October 8, along with supplemental briefing from both parties, which concluded on October 16. *See* Dkt. Entry of Oct. 8, 2019; Dkts. 37, 39-41.

B. The District Court's Order

The district court granted the application on October 25. Dkt. 45. In an accompanying memorandum opinion, the court first held that an impeachment trial in the Senate qualifies as a "judicial proceeding" as that term is used in Rule 6(e)(3)(E)(i). Although it acknowledged that it had previously reached the opposite conclusion, *see* Dkt. 46 at 39 n.27, the court rejected the Department's "plain meaning" reading of the term as reaching "legal proceedings governed by law that take place in a judicial forum before a judge or magistrate," because it believed that the plain meaning was inconsistent with the "broad interpretation given to the term 'judicial proceeding'" and "fails to grapple with the judicial nature of an impeachment trial," *id.* at 25-26. The court expressed the view that "impeachment trials are judicial in nature," *id.* at 26, noting that the Constitution uses terminology borrowed from the judicial setting to describe impeachment proceedings, *id.* at 27-33. The district court also opined that, in any event, *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc), and *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), establish that impeachment qualifies as a "judicial proceeding" within the meaning of the Rule. *See* Dkt. 46 at 39-40.

The district court next held that the Committee's activities were "preliminarily to" such an impeachment proceeding in the Senate. Dkt. 46 at 44-62. Despite (i) the

lack of any House or even Committee vote to commence an impeachment investigation; (ii) conflicting statements from Committee members and the Speaker of the House about whether the Committee is actually engaged in an impeachment investigation; and (iii) the fact that, even if the Committee were to refer impeachment articles, those articles need not lead to action by the full House (much less the Senate), the court believed that the overall record indicated that the Committee's investigation "has become focused on determining whether to impeach the President and thus has crossed the 'preliminarily to' threshold." *Id.* at 58. Although the court rejected the Committee's contention that "complete and absolute deference is due" to the Committee "in articulating the purpose of the current inquiry," it believed that waiting for evidence that the Committee or the House had taken concrete steps toward impeachment, such as by adopting an authorizing resolution, would constitute "an impermissible intrusion" on the House's authority to structure its own rules and impeachment proceedings. *Id.* at 59.

Finally, the district court held that the Committee had established a "particularized need" for the materials under Rule 6(e)(3)(E)(i). *See United States v. Sells Eng'g Inc.*, 463 U.S. 418, 443 (1983) (holding that a party seeking disclosure under Rule 6(e)(3)(E)(i) must make a "strong showing of a particularized need for grand jury materials," well beyond "mere relevance"). According to the court, the Committee had shown that disclosure was "needed to avoid a possible injustice in another judicial proceeding" because "[i]mpeachment based on anything less than all relevant

evidence would compromise the public's faith in the process." Dkt. 46 at 65. The court also suggested that accessing the secret grand-jury information underlying certain redactions in the Mueller Report might be relevant to "complete the full story" for the Committee, to test the veracity of witnesses who appear before Congress after appearing before the grand jury, or to "reach a final determination about conduct by the President described in the Mueller Report." *Id.* at 66-67. The court further concluded that these considerations outweighed any need for continued secrecy because the grand jury's investigation has concluded and the disclosure of "limited" information to the Committee, which has asserted that it will maintain that information confidentially, would be "unlikely to deter potential future grand jury witnesses" from testifying frankly. *Id.* at 71-72. The court discounted concerns about interference with ongoing criminal matters based on the Committee's representation that it would "negotiate with [the Department] about disclosure of any grand jury information that [the Department] believes could harm ongoing matters." *Id.* at 73-74.

The district court ordered the Department "to provide promptly, by October 30, 2019, to [the Committee] all portions of the Mueller Report that were redacted pursuant to Rule 6(e) and any underlying transcripts or exhibits referenced" in those portions. Dkt. 46 at 74-75. The court did not explain why it selected the October 30 deadline or why such a compressed timeline was necessary.

ARGUMENT

The propriety of a stay pending appeal turns on: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quotation omitted).

This standard is easily met here. The district court's opinion erroneously resolves multiple questions never clearly addressed by this Court in ordering the disclosure of grand-jury materials. And the district court's artificially compressed five-day timeline for disclosure, entered without explanation, needlessly creates irreparable harm by requiring disclosure before appellate review could be obtained. In order to permit review of these important issues, this Court should enter a stay pending appeal, as well as an immediate administrative stay.

I. The District Court's Order Incorrectly Resolved Multiple Novel And Unsettled Legal Questions Regarding Disclosure of Grand-Jury Records.

The district court's opinion addresses three questions this Court has never clearly addressed. It holds that a Senate impeachment proceeding is a "judicial proceeding" for purposes of Rule 6(e)(3)(E)(i); that the Committee's activities are "preliminarily to" such a proceeding; and that the Committee, by invoking impeachment as the source of its interest in grand-jury materials, need not satisfy the traditional "particularized need" standard for disclosure of grand-jury materials. A

contrary result on any one of these questions would result in the denial of the Committee's application. Because the district court's reasoning is erroneous in all three respects, the Department has a strong likelihood of success on the merits.

A. First, nothing in Rule 6(e) permits a district court to authorize the release of secret grand-jury information for use in a Senate impeachment trial. Although Congress has amended Rule 6(e)'s proscriptions over the decades, it has never enacted an exception for use in congressional impeachment proceedings. The Committee here was thus forced to assert in its application that a Senate impeachment trial constitutes a "judicial proceeding" within the meaning of Rule 6(e), which permits a district court to authorize the disclosure of grand-jury information "preliminary to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). That contention is meritless.

As the district court itself previously recognized, the ordinary meaning of the term "judicial proceeding" does not encompass impeachment proceedings. *See In re Application to Unseal Dockets Related to Independent Counsel's 1998 Investigation of President Clinton*, 308 F. Supp. 3d 314, 318 n.4 (D.D.C. 2018) (Howell, C.J.) ("Consideration by the House of Representatives, even in connection with a constitutionally sanctioned impeachment proceeding, falls outside the common understanding of 'a judicial proceeding.'"). Rather, that term encompasses legal proceedings governed by law that take place in a judicial forum before a judge or magistrate. *See, e.g.*, Judicial Proceeding, *Black's Law Dictionary* (11th ed. 2019) (defining term as "[a]ny court

proceeding; any proceeding initiated to procure an order or decree, whether in law or in equity").

Unsurprisingly, while the Supreme Court has never directly addressed whether a Senate impeachment proceeding qualifies as a "judicial proceeding" under Rule 6(e), the Court has characterized the "judicial proceeding" at issue in Rule 6(e)(3)(E)(i) as one arising in "litigation." *See United States v. Baggot*, 463 U.S. 476, 480 (1983). Likewise, in an oft-cited opinion, Judge Learned Hand described a "judicial proceeding" in Rule 6(e) as encompassing "any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime." *Doe v. Rosenberry*, 255 F.2d 118, 120 (2d Cir. 1958).

The remainder of the Rule's text confirms this understanding. Two other provisions of Rule 6(e) use the term "judicial proceeding" in regulating which courts should rule on a petition for disclosure under the "judicial proceeding" exception. *See* Rule 6(e)(3)(F), (G). These provisions, like the Advisory Committee notes that discuss them, unambiguously refer to a *court* proceeding. *See* Rule 6(e)(3)(G), Advisory Committee Notes, 1983 Amendments (describing what was then codified at subsection 6(e)(3)(E)). These provisions would make no sense if the term "judicial proceeding" in Rule 6(e) encompassed congressional impeachment proceedings.

The district court's rationales for ignoring the plain meaning of Rule 6(e) are unpersuasive. *First*, the district court suggested that the term "judicial proceeding" has been given a "broad interpretation" in various court decisions, and that this broad interpretation would cover a Senate impeachment proceeding. Dkt. 46 at 25. But even assuming these cases were all correctly decided—a question neither this Court nor the Supreme Court has ever addressed, *see Baggot*, 463 U.S. at 479 n.2 (declining to address "the knotty question of what, if any, sorts of proceedings other than garden-variety civil actions and criminal prosecutions might qualify as judicial proceedings")—they uniformly involve situations in which a proceeding occurs, or would ultimately occur, before a *court*. For example, the district court cited a case involving attorney disciplinary proceedings, which explains that such disclosures are authorized under the Rule because "the proceedings were designed to culminate in judicial review; the statute authorizing the proceedings envisioned that initial findings subsequently would be presented to a court; or resort to judicial review was clearly contemplated." *In re J. Ray McDermott & Co.*, 622 F.3d 166, 170 (5th Cir. 1980); *accord United States v. Bates*, 627 F.2d 349, 351 (D.C. Cir. 1980) (per curiam); *Rosenberry*, 255 F.2d at 119-20. These examples do not support a disclosure to a legislative body or other entity that is not a court and is wholly outside the normal judicial process.

Second, citing the terminology used in the Constitution, the district court suggested that an impeachment proceeding has a "judicial nature." Dkt. 46 at 26; *see id.* at 26-34. The question, however, is not whether the Constitution borrows terms

from the judicial sphere to describe impeachment proceedings, but whether the drafters of Rule 6(e)(3)(E)(i) intended the phrase "judicial proceeding" to encompass impeachment proceedings before the Senate. Nothing in the text or history of Rule 6(e) suggests such an incongruous intention.

Indeed, if anything, the district court's invocation of the constitutional and historical status of impeachment underscores the enormous differences between the inescapably political impeachment process and a court proceeding transpiring before a neutral magistrate applying fixed rules of procedure and substantive liability, as contemplated by the Rule. The Constitution textually commits the impeachment process to the legislative branch, to be overseen by Representatives and Senators who are politically accountable to the voters in regular elections. *See* U.S. Const. art. I § 3. The Constitution addresses the "judicial" power elsewhere, *see* U.S. Const. art. III § 1, and draws a clear distinction between the *political* sanction of removal from public office and the *penal* sanction that comes from conviction in a judicial proceeding post-removal, *see* U.S. Const. art. I, § 3, cl. 7.

The Constitution carefully separates congressional impeachment proceedings from criminal judicial proceedings because of the inevitably political nature of those proceedings. *See, e.g.*, Joseph Story, *Commentaries on the Constitution* (1833) § 783 ("[T]he offences, to which the remedy of impeachment has been, and will continue to be principally applied, are of a political nature," such that it is "natural to suppose" they "will be often exaggerated by party spirit."); *accord Nixon v. United States*, 506 U.S. 224,

234 (1993). This predictably political character is confirmed by the Senators' authority over Senate impeachment proceedings. When the Senate presides over impeachments, there is typically no judicial officer involved; the proceedings are overseen by the Vice President or whichever Senator is presiding at that time. And while it is true that "[w]hen the President of the United States is tried, the Chief Justice shall preside," U.S. Const. art. I, § 3, the Chief Justice's role is purely administrative, akin to a Parliamentarian. The Senators retain authority over both the procedural rules and substantive standards that govern the proceeding. *See, e.g.*, *Nixon*, 506 U.S. at 229; Senate Manual, *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials* (Jan. 1, 2014). In short, regardless of how much court-like procedure the legislators adopt, the congressional impeachment process is not a "judicial proceeding" under Rule 6(e)(3)(E)(i). *See In re Grand Jury 89-4-72*, 932 F.2d 481, 487 (6th Cir. 1991)

Third, the district court believed that this Court's decisions in *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc), and *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), collectively compel the conclusion that impeachment qualifies as a "judicial proceeding" for purposes of the Rule. Dkt. 46 at 37-43. But those decisions collectively contain a total of two sentences addressing this question. In *Haldeman*, this Court rejected a mandamus petition seeking to block disclosure of grand-jury materials to the House, expressing "general agreement" with the district court's treatment of Rule 6(e). 501 F.2d at 715. Given the mandamus posture of the case,

Haldeman addressed only whether the petitioner challenging disclosure there had shown a "clear and indisputable right to relief," *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1952), to preclude disclosure on the theories discussed by the district court, one of which was that impeachment qualifies as a "judicial proceeding" under Rule 6(e). In *McKeever*, which addressed the separate issue of whether district courts have "inherent authority" to disclose grand-jury materials outside the enumerated exceptions in Rule 6(e), a footnote in the opinion stated that the panel read *Haldeman* as "fitting within the Rule 6 exception for 'judicial proceedings.'" 920 F.3d at 847 n.3. Neither case considered, as a *de novo* matter, whether an impeachment trial in the Senate constitutes a "judicial proceeding" within the scope of the Rule, and neither contains the slightest reasoning explaining *how* impeachment would so qualify, contrary to ordinary English and constitutional structure.

B. The district court also erroneously decided that the Committee's investigation is "preliminarily to" an impeachment proceeding in the Senate. The Supreme Court has explained that this standard requires that a party's request for grand-jury materials must be "related fairly directly to some identifiable litigation, pending or anticipated," which requires more than that "litigation may emerge from the matter . . . or even that litigation is factually likely to emerge." *Baggot*, 463 U.S. at 480. Rather, "[i]f the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under [Rule (6)(e)] is not permitted." *Id.* Neither this Court nor any other has addressed when a House committee

impeachment investigation is "preliminarily to" a judicial proceeding for purposes of Rule 6(e)(3)(E)(i). It is likewise noteworthy that this case is considerably further away from a Senate impeachment proceeding than was *Haldeman*, where the Committee's "inquiry" was undertaken "pursuant to the authorization of the entire House." 501 F.2d at 715.

The Committee's request does not meet the "preliminarily to" standard for the simple reason that the Committee lacks the authority to precipitate or initiate an impeachment proceeding in the Senate. At most, it can refer articles of impeachment to the full House, which must vote to refer those articles to the Senate. There is thus "no particular reason why [the Committee's investigation] must lead to litigation" in the form of a Senate trial. *Baggot*, 463 U.S. at 480-81. Nor is it clear that the Committee's request for this grand-jury material has as its "primary purpose" the "preparation or conduct of a judicial proceeding." *Id.* at 480. The chairman of the Committee, the Speaker of the House, and others have offered conflicting statements about the "primary purpose" of the investigation at issue here—statements the district court never acknowledged. *See, e.g.*, *House Judiciary Committee Press Conference on Oversight Agenda Following Mueller Hearing* (July 26, 2019) (Committee Chairman Nadler stating on the day this Application was filed that "[a]n impeachment inquiry is when you consider only impeachment. That's not what we're doing. We're investigating all of this and will see what remedies we could recommend, including articles of

impeachment but not limited to that.")[1]; *Rep. Nancy Pelosi (D-CA) Continues Resisting Impeachment Inquiry*, CNN, June 11, 2019 (stating, on the day the House passed a resolution authorizing this application, that the House Democrat caucus was "not even close" to an "impeachment inquiry").[2] And even the primary statement the district court credited—a statement by the Speaker of the House made after the Department filed its opposition in this case—discussed an impeachment inquiry in relation to matters wholly unrelated to the Special Counsel's report. *See Pelosi Remarks Announcing Impeachment Inquiry* (Sept. 24, 2019) (discussing interactions between the President and the leader of Ukraine)[3]; *see* Rachael Bade and Mike DeBonis, *Democrats Count on Schiff to Deliver Focused Impeachment Inquiry of Trump*, Wash. Post (Sept. 29, 2019) (reporting that the Speaker has announced that its impeachment inquiry will focus narrowly on issues surrounding Ukraine).[4] The district court did not and could not contend that the grand-jury material at issue here is somehow relevant to an inquiry into those separate matters.

C. Finally, the district court's assessment of the Committee's "particularized need" standard applied a novel version of that standard that has no basis in this

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[1] Available at https://www.c-span.org/video/?463045-1/house-judiciary-committee-democrats-defend-robert-mueller-plan-continue-investigation

[2] Available at http://transcripts.cnn.com/TRANSCRIPTS/1906/11/cnr.04.html

[3] Available at https://www.speaker.gov/newsroom/92419-0

[4] Available at https://www.washington post.com/politics/pelosi-turns-to-schiff-to-lead-house-democrats-impeachment-inquiry-of-trump/2019/09/28/ed6c4608-e149-11e9-8dc8-498eabc129a0_story.html

Court's precedent and ignored the Committee's concession, when challenged, that it could not meet that standard as traditionally applied.

Because of the strong policy reasons favoring grand-jury secrecy, the Supreme Court has held that a party seeking disclosure under Rule 6(e)(3)(E)(i) must make a "strong showing of a particularized need for grand jury materials," well beyond "mere relevance." *Sells Eng'g Inc.*, 463 U.S. at 443. Specifically, parties seeking grand-jury material must show that "the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979). Requests for wholesale disclosure of grand-jury transcripts generally do not satisfy this requirement. *Id.* And any assessment of particularized need must consider "any alternative discovery tools available." *Sells Eng'g*, 463 U.S. at 455.

Application of the ordinary "particularized need" standard under these cases would have compelled denial of the House's application. Only a very small fraction of the Report—less than two percent—is redacted on the basis of Rule 6(e). The bulk of those redactions are in Volume I of the Report, which concerns Russian interference in the 2016 election. There are only a handful of 6(e) redactions in Volume II of the Report, which concerns the stated basis for the Committee's interest in the grand-jury materials—whether the President's actions "constitute obstruction of justice." Dkt. 1 at 35. The redactions that do appear in the Report, furthermore,

are surgical, which should have enabled the Committee to advance particularized arguments based on specific redactions if it believed it was capable of doing so. *See, e.g.*, Dkt. 20-9 at 46, 105. But the Committee did not. Indeed, the first and only time the district court challenged the Committee to explain its particularized need for a specific redaction at the hearing, counsel for the Committee immediately conceded that the Committee could "take that one off the table." Dkt. 38 at 37:25-38:1. There is no reason to believe that the Committee's "particularized need" for any other redactions is any better, particularly given that the district court did not undertake an *in camera* review of the grand-jury materials (as the Committee requested, unopposed by the Department).

The district court's remaining discussion of particularized need similarly inverts the applicable legal principles. For example, instead of discounting the Committee's particularized need because the Committee has access to (and has used) "alternative discovery tools" in the form of interviews with overlapping witnesses of interest, *Sells Eng'g*, 463 U.S. at 455, the district court asserted that "the overlap between these investigations enhances, rather than detracts from, [the Committee]'s showing of 'particularized need,'" Dkt. 46 at 69. The district court also speculated, without any particular showing based on specific redactions from the Report or congressional testimony, that "the grand jury material . . . may be helpful in shedding light on inconsistencies or even falsities in the testimony of witnesses called in the House's impeachment inquiry." *Id.* at 66. Indeed, the court acknowledged in a footnote that

the primary example that the Committee advanced in support of this need—former White House counsel Don McGahn—did not testify before the grand jury. *Id.* at 67 & n.47.

The district court's failure to apply the ordinary "particularized need" standard appears rooted in its belief that, in contrast to a civil or criminal proceeding, the ordinary standard should not apply to impeachment proceedings because such proceedings must have available "all relevant evidence." Dkt. 46 at 65. Thus, the court—without citation—asserted that disclosure of all relevant grand-jury information was necessary to enable the Committee "to investigate fully," to consider "investigatory routes left unpursued," and to "assess[] the need to fill acknowledged evidentiary 'gaps' in the Special Counsel's investigation." *Id.* at 67, 68, 69. These assertions are remarkable. No case from this Court or the Supreme Court could be cited for these propositions, which verge on a *per se* rule that disclosure is required in any impeachment proceeding. Such a rule would be particularly inappropriate given the strong interest in preventing interference with ongoing criminal matters and ensuring that future grand juries are able to obtain "full and frank testimony." *Douglas Oil*, 441 U.S. at 222. The district court barely acknowledged these interests, which are at their peak when the grand jury investigates issues of high political salience. It is not difficult to imagine that future grand juries would be impeded in high-profile matters if witnesses knew that their testimony would necessarily be disclosed to the House in

connection with an impeachment investigation (let alone an inchoate and informal one).

II. The Remaining Factors Strongly Support A Stay

In the absence of a stay, the government will suffer irreparable harm. Once the information is disclosed, the Department's attempt to appeal the district court's ruling would be irreparably damaged. *See, e.g., John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) (noting in a FOIA case that "[t]he fact that disclosure would moot that part of the Court of Appeals' decision requiring disclosure of the Vaughn index would also create an irreparable injury"). Where, as here, the denial of a stay would "entirely destroy [a defendant's] rights to secure meaningful review," the irreparable injury standard for obtaining a stay is satisfied. *Providence Journal*, 595 F.2d at 890. Nor is disclosure necessarily limited to the Committee, which could make the materials public by a simple majority vote. *See* Dkt. 1-25, ¶ 5.

In addition, the Committee would not be prejudiced by a stay pending appeal, and the public interest favors allowing an orderly appellate resolution of the important questions presented here. The Committee waited over two months to bring this application after expressing its intent to do so, and then agreed to a briefing schedule that extended over an additional two months. The Committee did not request—and has not articulated any reason that would support—the district court's arbitrarily imposed five-day deadline. Indeed, if anything, this matter is even less exigent now

that the House has made clear that its primary investigatory focus is the President's actions in relation to Ukraine. There is no reason to artificially compress (or preclude entirely) this Court's consideration of the significant issues presented by this appeal. While the Committee has not demonstrated that any expedited consideration is necessary, the Department would be prepared to agree to a prompt briefing schedule—*e.g.*, 30/30/14, with oral argument to follow on the first available date thereafter—if the Court wished to ensure expedited resolution of the issues presented by the Department's appeal.

CONCLUSION

For the foregoing reasons, this Court should (1) enter an immediate administrative stay of the district court's order while this motion is considered and (2) enter a stay of the order pending appeal. If the Court denies this request, the Court should at a minimum enter an administrative stay, or continue such a stay, for a reasonable period to allow the Solicitor General an opportunity to seek relief from the Supreme Court.

Respectfully submitted,

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OCTOBER 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion satisfies the type-volume limitation in Rule 27(d)(2)(A) because it contains 5,181 words. This motion complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it was prepared using Microsoft Word 2013 in Garamond, 14-point font, a proportionally-spaced typeface.

/s/ *Brad Hinshelwood*
Brad Hinshelwood

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2019, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Brad Hinshelwood*
Brad Hinshelwood